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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~252.~~ 39

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, APPELLANTS,

vs.

CHARLES BECKWITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 14, 1876.

Post until 916 advanced
& argued

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39

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN. } *ss.*

At a stated term of the Circuit Court of the United States of America for the Eastern District of Wisconsin, begun and held according to law at the city of Milwaukee, in said district, on the first Monday (being the third day) of January, A. D. 1876.

Present and presiding, the Honorable Thomas Drummond, circuit judge.

Among other, the following proceedings were had, to wit:

CHARLES BECKWITH, COMPLAINANT,
vs.
THE TOWN OF MT. PLEASANT, THE TOWN OF CALEDONIA, and the City of Racine, Defendants. } In Equity.

Be it remembered, that heretofore, to wit, on the 1st day of April, A. D. 1873, came the above-named complainant, by his solicitors, Messrs. Fuller & Dyer, and filed his bill of complaint against the above-named defendants, as follows, to wit:

2 *Bill of Complaint.*

UNITED STATES OF AMERICA.

The Circuit Court of the United States in and for the Eastern District in the State of Wisconsin, in chancery sitting.

CHARLES BECKWITH, COMPLAINANT,
against
THE TOWN OF MOUNT PLEASANT, THE Town of Caledonia, and the City of Racine, Defendants.

To the judges of the Circuit Court of the United States for the Eastern District of the State of Wisconsin, in the United States of America.

Charles Beckwith, of the city of Hartford, in the State of Connecticut, and a citizen and resident of the State of Connecticut, brings this his bill against the town of Mount Pleasant, the town of Caledonia, and the city of Racine, each of said defendants being corporations municipal, created and existing under and by virtue of the laws of the State of Wisconsin, in the county of Racine, in the State of Wisconsin, and, within the meaning of the law, citizens and residents of the said State of Wisconsin, in the eastern
3 district of the said state.

The complainant, Charles Beckwith, complains, alleges, and avers, that by an act of the legislature of the Territory of Wis-

consin, which territory now is the State of Wisconsin, passed on or about the 2d day of January, A. D. 1838, entitled "An act to establish the several towns in the counties of Milwaukee, Brown, and Racine, and the counties thereto attached, for judicial purposes," the town of Racine, in said county of Racine, in said then Territory, now State, of Wisconsin, was created and established and then became a corporation municipal; that by the terms of such act the territorial boundaries and limits of the said town of Racine were fixed and included within and described in terms, to wit: commencing on Lake Michigan at the south line of town. three north, fractional range twenty-three east; thence due west by said line to the southwest corner of section thirty-five of town. three north, of range twenty-two east; thence north to the north line of town. four; thence east with said line to Lake Michigan; thence southerly by said lake to the place of beginning.

This complainant further alleges and avers, that the said defendant, the town of Mount Pleasant, under and by virtue of an
4 act of the Territory of Wisconsin, now being the State of Wisconsin, entitled "An act to establish the several towns in the counties of Milwaukee, Brown, and Racine, and the counties thereto attached, for judicial purposes," passed and approved on or about the 2d day of January, A. D. 1838, was established and then became a corporation municipal; that by the terms of such act the territorial limits and boundaries of the said town of Mount Pleasant were fixed and included within and described in terms, to wit: that the country included within the following limits, to wit: commencing at the southwest corner of Racine town; thence due west to the southwest corner of town. three north, of range twenty-one east; thence north to the north line of town. four; thence east to the northwest corner of Racine town; thence south to the place of beginning—which last-described territory and lands, by virtue of the act last aforesaid, were set off into a separate town by the name of the defendant, the town of Mount Pleasant.

This complainant further avers and alleges, that by an act of the legislature of the Territory of Wisconsin, now the State of Wisconsin, entitled "An act to organize certain towns in the county of Racine," passed and approved February 7th, A. D. 1842,
5 the said defendant, the town of Caledonia, was created a body corporate and municipal, and its territorial limits were then established by said law to be and were all that part of the towns of Racine and Mount Pleasant comprised in town. four, in range twenty-two east, in said county of Racine, and in the then Territory and now the State of Wisconsin.

And by the provisions of section three of the same act, the boundaries of the town of Mount Pleasant were changed so as to include within said town the following territory: all of township No. three (3) north, of range twenty-two (22) east, except section No. thirty-one of said township.

That the said defendant, the city of Racine, in and by virtue of an act of the legislature of the State of Wisconsin, entitled "An act to incorporate the city of Racine, in the county of Racine," passed and approved August 8th, A. D. 1848, was erected and created, in and by which act the country and territorial limits were described as follows, to wit: the district of country included within the following limits and boundaries in township number three, of range number twenty-three, in the county of Racine and State of Wisconsin, to wit: fractional sections numbered nine and sixteen in said township and range, situated in the said county of
6 Racine and State of Wisconsin.

This complainant further avers and alleges, that by an act of the legislature of the State of Wisconsin, entitled "An act to incorporate the Racine, Janesville and Mississippi Railroad Company," passed and approved April 17th, 1852, the corporation, the Racine, Janesville & Mississippi Railroad Company, were incorporated, and by the terms of said act were authorized and empowered to locate, construct, and operate a railroad from the city of Racine, in the county of Racine and State of Wisconsin, through the counties of Rock, Green, La Fayette, and Grant, in said State of Wisconsin, to the Mississippi river; and by such act the said corporation, the Racine, Janesville and Mississippi Railroad Company, were authorized and empowered to organize such corporation, and to have and maintain a capital stock of three million dollars, and to issue such stock in shares of one hundred dollars each, and that the said Racine, Janesville and Mississippi Railroad Company, by the terms of the act last named, had and now have perpetual succession; to which act and the amendments thereto this complainant hereby refers, and makes the same a part of this bill of complaint.

This complainant further alleges and avers, that under
7 and by virtue of the law last hereinabove named, the corporation, the Racine, Janesville and Mississippi Railroad Company, in the month of April, A. D. 1852, was duly organized, and under and by virtue of said act and organization the said corporation, the Racine, Janesville & Mississippi Railroad Company, for the purposes named in such act, were authorized and empowered to receive subscriptions to its capital stock, and to issue certificates of stock for the purposes aforesaid.

This complainant further avers and alleges, that by an act of the legislature of the State of Wisconsin, entitled "An act to authorize certain towns to aid in the construction of the Racine, Janesville and Mississippi Railroad," passed and approved April 2d, 1853, being chapter 289 of the laws of said state passed in 1853, the said corporation municipal, to wit, the town of Racine, was authorized and empowered to subscribe for and take capital stock of the said corporation, the Racine, Janesville and Mississippi Railroad Company, to the amount of fifty thousand dollars, and pay for

the same and become obligated to pay for the same in the bonds of the said town, payable within twenty years from the date of such bonds, with interest, payable annually in the city of New York, at a rate not exceeding seven per cent. per annum.

This complainant further alleges and avers, that the said
8 the town of Racine, on or about the 6th day of December, A. D, 1853, pursuant to the provisions of the said act of the said legislature of the State of Wisconsin, the provisions of which act had theretofore been complied with by the said corporation, the town of Racine, by its then duly authorized officers and agents, subscribed for and took fifty thousand dollars of the capital stock of the said corporation, the Racine, Janesville and Mississippi Railroad Company; whereupon, and in payment for such stock subscribed for as aforesaid, the said corporation, the town of Racine, on or about the said 6th day of December, A. D. 1853, under and with its corporate seal, and by its then officers, duly authorized, did make and deliver to the said corporation, the Racine, Janesville & Mississippi Railroad Company, one hundred bonds, with coupons or interest-warrants attached thereto, which bonds were numbered from one to one hundred, inclusive, and each and every one of them, except the numbers, are in substance and form as follows, to wit:

9 By special authority of the State Legislature.

United States of America,

Town of Racine.—State of Wisconsin.

No. —— $500.

The town of Racine acknowledge themselves to owe the Racine, Janesville & Mississippi Railroad Company the sum of five hundred dollars for five shares of one hundred dollars each in the capital stock of said company, subscribed for and purchased of said company by said town, which sum said town promise to pay to said company, or to the holder hereof, at their office in the city of New York, on the tenth day of February, 1873, and also interest thereon at the rate of seven per centum per annum, payable annually on the tenth day of each February ensuing the date hereof, until the said principal sum shall be paid, on presentation of the annexed interest-warrants at said office.

And it is further agreed that this obligation and all rights and benefits arising therefrom may be transferred by general or special endorsement or by delivery, as if the same were a note of hand payable to bearer.

In testimony whereof, the board of supervisors of said
[SEAL.] town have caused to be affixed its corporate seal and these presents to be subscribed by their chairman and attested by the clerk thereof, this 6th day of December, 1853.

Attest, JAS. MOTT TITUS. STEPHEN N. IVES, *Chairman*.

JAS. MOTT TITUS, *Clerk*.

I, J. Mott Titus, clerk of the town of Racine, do hereby certify that the foregoing obligation is issued in pursuance of a special act of the legislature of the State of Wisconsin, entitled "An act to authorize certain towns to aid in the construction of the Racine, Janesville & Mississippi railroad, approved April 2, 1853," and sanctioned by a majority of the legal voters of said town at an election duly held for such purpose December 5, 1853.

JAS. MOTT TITUS, *Clerk.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1873, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1872, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1871, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1870, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1869, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1868, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on pre-

sentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1867, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1866, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the *Bond* of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1865, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1864, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1863, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1862, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1861, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1860, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1859, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1858, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1857, at the office of the Racine, Janesville & Mississippi Railroad Company in the City of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1856, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1855, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on pre-

sentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

$35.00. The town of Racine will pay thirty-five dollars on the 10th day of February, 1854, at the office of the Racine, Janesville & Mississippi Railroad Company in the city of New York on presentation hereof, being the interest due that day on the bond of said town number issued to said company.

By order of the Board of Supervisors.

A. H. VAN VALKENBERG, *Treasurer.*

10 This complainant further alleges and avers, that for a valuable consideration by him paid to the said corporation, the Racine, Janesville & Mississippi Railroad Company, on or about the 10th day of January, A. D. 1854, the said corporation, the Racine, Janesville & Mississippi Railroad Company, sold and delivered to this complainant, and he, this complainant, became possessed of and the owner of all those certain bonds made, executed, and issued by the said corporation, the town of Racine, each for the principal sum of five hundred dollars, bearing interest at the rate of seven per cent., payable annually, hereinabove described, numbered from seventy to eighty-nine inclusive, said bonds being of the denomination and containing the conditions and covenants hereinabove described and stated; which bonds, and each of them, are now in full force and effect, and wholly unpaid and unsatisfied, principal and interest, to wit, the sum of ten thousand dollars principal, and the interest thereon, at the rate of seven per cent. per annum, from the 10th day of February, 1853.

By chapter 68 of the local laws of the State of Wisconsin for the year 1857, approved February 23, 1857, the boundaries of the towns of Caledonia, Mt. Pleasant, and Racine were changed, and said towns severally made to include the following territory:

11 *Caledonia.* All the territory in the county of Racine east of the line between ranges 21 and 22, and north of a line running from the southwest corner of section No. 19, town. four (4), range 22 east, eastwardly on section lines to the east line of the county of Racine.

Mount Pleasant. All the territory in said county of Racine east of the line between ranges 21 and 22, and south of a line running from the southwest corner of section seven (7), town. three (3), range 22, eastwardly on section lines to the east line of the county of Racine, except fractional section 16 of town. 3, range 23 E.

Racine. All the territory in said county lying between the towns of Caledonia and Mount Pleasant as above bounded, and east of the range line between ranges 21 and 22, except fractional section 9 of town. 3, range 23 east.

This complainant further avers and alleges, that on or about the

2d day of December, A. D. 1859, the name of the said corporation, the town of Racine, was changed to the town of Orwell.

This complainant further alleges, that by an act of the legislature of the State of Wisconsin, entitled "An act to vacate and extinguish the town of Orwell, in the county of Racine, and to attach the territory comprising the same to the towns of Mount Pleasant
12 and Caledonia, in said county," passed and approved March 30th, 1860, the corporation and body-politic formerly known as the town of Racine, and subsequently as the town of Orwell, in the county of Racine, was in terms by said act last named vacated and extinguished, and, thereafter, to wit, after the said 30th day of March, 1860, had no existence, and now has no existence, as a separate and independent body-politic and corporate, except as provided in the said act last hereinabove named; that all that portion of the territory in the said town of Orwell, formerly known as the town of Racine, lying north of the line between township number three and township number four, was by the terms of said act of said legislature annexed to and became a part of the territory and lands of the town of Caledonia, one of the above-named defendants; and all that part of the said territory of the said town of Orwell, formerly known by the name of the town of Racine, which lies south of said line between said townships number three and four, was annexed to and became a part of the territory and lands of the town of Mount Pleasant, one of the defendants hereinabove named; and this complainant, for greater certainty, hereby refers to and makes the said act last above named a part of this complaint.

13 This complainant further alleges and avers, that by an act of the legislature of the State of Wisconsin, entitled "An act to amend an act entitled an act and consolidate an act to incorporate the city of Racine, approved August 8, 1848, and the several acts amendatory thereof, approved March 22, 1866, and the several acts amendatory thereof, and to extend the corporate limits of said city of Racine," passed and approved March 17th, 1871, the territorial limits and boundaries of the city of Racine were extended, and such boundaries and limits of said city of Racine now include all of the territory and lands described as follows, to wit: commencing at a point where the east and west center line of section number twenty-one, in township number three north, in range number twenty-three east, strikes the waters of Lake Michigan; thence west on the east and west center line of sections number twenty-one and twenty, to the southwest corner of the east half of the northeast quarter of section number twenty; thence north parallel with the east line of sections numbers twenty and seventeen to a point eight rods north of the north line of the Racine and Rock River Plank Road, so called; thence easterly parallel to the north line of said plank road to the east line of said section
14 number seventeen; thence north on the east line of said section seventeen aforesaid to the center of Root river; thence

southwesterly along the center of the said river to a point eighty rod west of the east line of said section number seventeen; thence north parallel to and eighty rods distant from the east line of sections number seventeen, eight and five, to the east and west center line of section number five; thence east on the east and west center line of sections number five and four to the center of said section number four; thence south forty rods; thence east to the waters of Lake Michigan; from thence to the place of beginning.

This complainant further alleges, that in and by the terms of the last hereinabove-named act of the legislature of the State of Wisconsin, it is provided that the said city of Racine, one of the defendants herein named, shall assume and pay so much of the municipal indebtedness of the former town of Racine, as the lands described in said act last named herein may be or become legally chargeable with and liable to pay, as stated and provided by the terms and provisions of the law and act of the State of Wisconsin herein last above named.

The complainant further alleges and avers, that the said defendants, the town of Mount Pleasant, the town of Caledonia, and
15 the city of Racine, are now possessed of and have within their territorial limits the lands and territory which formed and comprised the municipal corporation, the town of Racine, at the time when the said town of Racine made, executed, and delivered its bonds hereinabove described; and this complainant avers that the said defendants, the said town of Mount Pleasant, the town of Caledonia, and the city of Racine, are justly indebted to and owe to this complainant the said sum of ten thousand dollars principal, and interest thereon from the said 10th day of February, 1853, in terms secured to be paid by the said bonds issued by the said municipal corporation, the town of Racine, as hereinabove stated and described.

This complainant charges and alleges, that he has no adequate remedy in the premises at common law, and is only relievable by the aid and interposition of your honorable court in chancery sitting, where matters of this nature are properly cognizable and relievable. To the end, therefore, that the defendants may, if they can, show cause why this complainant should not have the relief hereby prayed and demanded, may, according to the best and utmost of their several and respective knowledge, informa-
16 tion, remembrance, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, this complainant hereby waiving the necessity of the answers of the said defendants being put in under oath; and may it please this court that the respective liabilities of each and all of the defendants upon the bonds hereinbefore mentioned and described, be ascertained, determined, and decreed by this court; that the amount due and owing to complainant on said bonds be also ascertained and determined, and that the defendants be adjudged and decreed to pay to

complainant the amount, principal and interest, which may be by this court found to be due and owing to him thereon; that said several defendants and their respective officers be adjudged and decreed to take such necessary steps and proceedings as shall be necessary to secure the payment to complainant of the amount found due and owing to him upon said bonds; that it may also be ascertained and determined by this court what lands, property, and territory of said defendants are liable and obligated for the payment of the moneys secured to be paid by said bonds, and that on the final hearing of this cause complainant may have such other or further relief as may be agreeable to equity and good conscience.

17 May it please your honors to grant unto this complainant the writ of subpœna issuing out of and under the seal of this honorable court against the defendants, the town of Mount Pleasant, the town of Caledonia, and the city of Racine, commanding them and each and every of them to appear and answer all and singular the premises herein stated, and abide by and perform such orders and decrees as may be made herein.

And this complainant will ever pray, &c.

CHARLES BECKWITH.
FULLER & DYER,
Solicitors for Complainant, Racine, Wis.

CHARLES E. DYER, *of Counsel.*

UNITED STATES OF AMERICA,
STATE OF WISCONSIN, } *ss.*
EASTERN DISTRICT OF WISCONSIN.

Henry T. Fuller, being duly sworn, doth depose and say that he is one of the attorneys for Charles Beckwith, the complainant named in the above and foregoing bill of complaint; that the said Charles Beckwith resides in the city of Hartford, in the State of Connecticut, and is not now within the State of Wisconsin; that this deponent resides in the city of Racine, in the said State of Wisconsin; that he, this deponent, makes this affidavit and verification

18 for and on behalf of the said complainant, Charles Beckwith; that this deponent has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

Deponent further says he derives such knowledge and the truth of the statements contained in said bill of complaint by personally acting as attorney for said complainant and from the inspection of the records of the town of Racine named in said bill of complaint, and the laws of the said State of Wisconsin. Deponent further says that the bonds described in the above bill of complaint have been in his possession as the attorney for said Charles Beckwith for and

during several years last past, and that he has had charge of the same for collection under instructions and directions of the said complainant, Charles Beckwith.

HENRY T. FULLER.

Subscribed and sworn to, this 31st day of March, A. D. 1873, before me.

CHARLES H. LEE,
United States Commissioner, Eastern District of Wisconsin.

And same day filed bond for costs, which is approved.
Whereupon a subpœna issued, as follows:

19 UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN.

The President of the United States of America to the town of Mount Pleasant, the town of Caledonia, and the city of Racine, greeting: [SEAL.]

You are hereby commanded, that you personally appear before the judges of the Circuit Court of the United States of America for the Eastern District of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of May next ensuing, at Milwaukee, to answer to a bill of complaint, exhibited against you in our said court by Charles Beckwith.

And to do further, and receive what our said court shall have considered in that behalf: and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said the town of Mount Pleasant, the town of Caledonia, and the city of Racine, if to be found in his district, and due return thereof make.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this first day of April, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh.

EDWARD KURTZ, *Clerk.*

FULLER & DYER, *Solicitors.*

It is ordered by our said court that the said the town of Mount Pleasant, the town of Caledonia, and the city of Racine, the defendants aforesaid, do enter their appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid; otherwise the bill filed may be taken as confessed.

20 And on or before the return day of said subpœna the marshal returned the same with his return endorsed thereon, as follows, to wit:

Return.

Served the within subpœna on the within-named city of Racine, by delivering to R. Doud, the mayor, and James Beaugrand, the clerk of said city, personally, each a true copy, and by showing to each the original, on the 2d day of April, 1873. And I further certify that on said 2d day of April, 1873, I served the within subpœna on the town of Mount Pleasant, by delivering to R. Richards, the chairman of supervisors of said town, and O. C. Monroe, the clerk of said town of Mt. Pleasant, personally, each a true copy, and by showing to each the original. And I further certify that on the said day aforesaid I served the within subpœna on the town of Caledonia, by delivering to the chairman of supervisors, J. Hermes, of said town, and F. Seebach, the clerk of said town, personally, each a true copy. C. S. Hamilton, marshal, by F. Schneider, deputy." Fees, $19.40.

April 15, 1873.—This day came the defendant, the town of Mt. Pleasant, by its solicitors, Messrs. Fish & Lee, and filed its appearance, as follows:

Circuit Court of the United States, Eastern District of Wisconsin.

21 *Appearance.*

CHARLES BECKWITH
vs.
TOWN OF MOUNT PLEASANT, TOWN OF Caledonia, et al.

The undersigned hereby give notice that they have been retained by the defendant, the town of Mount Pleasant, and they appear for said defendants in the above-entitled cause as their solicitors.

Racine, April 14th, 1873. FISH & LEE,
Solicitors for Deft., Town of Mount Pleasant, Racine, Wis.

April 16, 1873.—This day came the defendant, the town of Caledonia, by its solicitors, Messrs. Jenkins & Elliott, and filed its appearance, as follows:

U. S. Circuit Court, Eastern District Wis.

CHARLES BECKWITH
vs.
THE CITY OF RACINE, THE TOWN OF Mount Pleasant, and the Town of Caledonia. In Equity.

SIR: Please enter an appearance for the defendant, the town of Caledonia.

Dated Milwaukee, April 16th, 1873.

JENKINS & ELLIOTT,
Solrs. for Deft., the Town of Caledonia.

To EDWARD KURTZ, Esq., *Clerk.*

22 May 5, 1873.—This day came the defendant, the city of Racine, by its solicitors, Mr. S. B. Van Buskirk, and filed its appearance as follows:

UNITED STATES OF AMERICA.

The Circuit Court of the United States in and for the Eastern District in the State of Wisconsin. In chancery sitting.

CHARLES BECKWITH, COMPLAINANT,
against
THE TOWN OF MOUNT PLEASANT, THE TOWN of Caledonia, and the City of Racine, Defendants.

SIR: Please to enter my appearance for the city of Racine, one of the defendants in the above cause.

Dated May 5, 1873. S. B. VAN BUSKIRK,
Solicitor for Deft., the City of Racine.

To EDWARD KURTZ, *Clerk U. S. Circuit Court.*

June 2, 1873.—This day came the defendant, the town of Mount Pleasant, by its solicitors, Messrs. Fish & Lee and Palmer, Hooker & Pitkin, and filed its demurrer; and came the defendant, the town of Caledonia, by its solicitors, and filed its demurrer; and came the defendant, the city of Racine, by its solicitors, and filed its demurrer, as follows:

23 *Demurrer of Town of Mt. Pleasant.*

In the Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES BECKWITH
vs.
THE TOWN OF MOUNT PLEASANT, the Town of Caledonia, and the City of Racine.

The demurrer of the town of Mount Pleasant, defendant, to the bill of complaint of Charles Beckwith, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth, that the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant; wherefore this defendant demands the judgment of this honorable court, whether he shall be compelled to

make any further or other answer to the said bill or any of
24 the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

FISH & LEE,
PALMER, HOOKER & PITKIN,
Solicitors for the Town of Mount Pleasant.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

H. L. PALMER, *of Counsel.*

EASTERN DISTRICT OF WISCONSIN, } *ss.*
MILWAUKEE COUNTY. }

H. L. Palmer, being duly sworn, says that he is one of the solicitors of the above-named defendant, the town of Mount Pleasant, and makes this affidavit on its behalf; that said defendant is a corporation; that the foregoing demurrer is not interposed for delay.

H. L. PALMER.

Subscribed and sworn to before me, this 2nd day of June, A. D. 1873.

HORACE L. PALMER,
Notary Public, Milwaukee County, Wis.

Demurrer of Town of Caledonia.

In the Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES BECKWITH
vs.
THE TOWN OF MOUNT PLEAS-
25 ant, the Town of Caledonia, and the City of Racine.

The demurrer of the town of Caledonia, one of the above-named defendants, to the bill of complaint of Charles Beckwith, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth, that the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or

other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

JENKINS & ELLIOTT,
Solicitors for Defendant, the Town of Caledonia.

I certify that, in my opinion, the foregoing demurrer is well founded in law.

JAS. G. JENKINS,
Of Counsel for Deft., the Town of Caledonia.

26 EASTERN DISTRICT OF WISCONSIN, } ss.
COUNTY OF MILWAUKEE. }

James G. Jenkins, being duly sworn, says that he is one of the attorneys for the defendant, the town of Caledonia, above named, and makes this affidavit on its behalf; that said defendant is a corporation, and that the foregoing demurrer is not interposed for delay.

JAS. G. JENKINS.

Subscribed and sworn to before me, this 2d day of June, 1873.
EUGENE S. ELLIOTT,
Notary Public, Mil. Co., Wis.

Demurrer of City of Racine.

United States Circuit Court, Eastern District of Wisconsin.

CHARLES BECKWITH, PLAINTIFF,
vs.
THE TOWN OF MOUNT PLEASANT, THE Town of Caledonia, and the City of Racine, Defendants.

The city of Racine, one of the defendants above named, by protestation, and not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

27 *First.* That the said city of Racine is not a necessary or proper party to the complainant's said bill.

Second. That the said complainant has an adequate remedy at law for the alleged cause of action in the complainant's bill set forth; and

Third. That the said complainant hath not in and by said bill made or stated such a case as doth entitle him to any such discovery or relief as is therein sought and prayed for, or any discovery or relief from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other an-

swer to said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

Dated June 2, 1873.

S. B. VAN BUSKIRK,
Sol. for Deft., the City of Racine.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

S. B. VAN BUSKIRK,
Counsel for the Deft., the City of Racine.

28 United States Circuit Court, Eastern District of Wisconsin.

CHARLES BECKWITH, PLAINTIFF,
vs.
THE TOWN OF MOUNT PLEASANT, THE Town of Caledonia, and the City of Racine, Defendants.

STATE OF WISCONSIN, RACINE COUNTY. } *ss.*

Reuben Doud, being first duly sworn, says that he is the mayor of the city of Racine, one of the defendants named in the foregoing-entitled action, and that the demurrer filed therein is not interposed for delay.

REUBEN DOUD.

Subscribed and sworn to before me, this 2nd day of June, A. D. 1873.

[SEAL.]

SAMUEL RITCHIE,
Notary Public.

July 7, 1873.—"On motion of Fuller & Dyer, complainant's solicitors, ordered that the demurrers to the bill of complaint on file herein be and hereby are set down for argument at the next term of this court, commencing on the first Monday of October next."

29 November 14, 1874.—This day came the parties by their counsel, and the several demurrers of the defendants to the bill of complaint came on to be heard, and were argued by Messrs. Dyer and Lynde for the complainant, and by Mr. J. T. Fish for the defendant, the town of Mount Pleasant, L. S. Dixon and James G. Jenkins for the town of Caledonia, S. B. Van Buskirk for the city of Racine, and J. R. Doolittle for certain citizens, and the hearing being concluded, the court took time to consider of the same.

Order Overruling Demurrers.

November 16, 1874.—This day came the parties, by their counsel, and on consideration of the demurrers of the several defend-

ants to the bill of complaint in this cause, it is ordered by the court that the said demurrers be and hereby are overruled. And it is further ordered that the defendants answer the bill of complaint by the first day of January next, or the same will be taken as confessed.

Substitution of Compl't's Solicitors.

April 28, 1875.—Substitution of complainant's solicitors filed as follows:

In the Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES BECKWITH, COMPLAINANT,
vs.
THE TOWN OF MOUNT PLEASANT, THE Town of Caledonia, and the City of Racine, Defendants.

LATHAM CORNELL, Complainant,
vs.
SAME, Defendants.

30 It is stipulated in the above causes that Fuller & Harkness may be substituted, as solicitors of record for the above-named complainants, in the place and stead of Fuller & Dyer, the last-named firm having been dissolved.

Dated April 28th, 1875.

S. B. VAN BUSKIRK,
Solicitors for the City of Racine, one of the defts. above named.
FISH & LEE,
Solicitors for the Town of Mt. Pleasant.
JENKINS, ELLIOTT & WINKLER,
Sol'rs for Town of Caledonia.

And same day, upon motion of the complainants' counsel, and the stipulation in writing of the defendants' solicitors herein filed, it is ordered by the court that Fuller & Harkness be substituted as solicitors for the complainant.

And same day came the defendants, by their respective solicitors, and filed their separate answers, as follows:

Answer of Town of Mt. Pleasant.

In the Circuit Court of the United States for the Eastern District of Wisconsin. In equity.

The answer of the town of Mount Pleasant, defendant to the bill of complaint exhibited in this court by Charles Beckwith, complainant, against the town of Mount Pleasant, the town of Caledonia, and the city of Racine.

31 This defendant, the town of Mount Pleasant, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the manifold errors and insufficiencies in complainant's bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

That by an act of the legislature of the State of Wisconsin, entitled "An act to amend an act entitled 'An act to incorporate the city of Racine, in the county of Racine,' approved August 8, 1848, and all other acts amendatory thereto," approved March 6, 1856, and being chapter 83 of the Private and Local Acts of the State of Wisconsin for the year 1856, the following described territory, being part of the then territory of the town of Racine, now annexed to and constituted and became part of the city of Racine, to wit: the north half of section twenty-one (21), the northeast quarter of section number twenty (20), the east half of section number seventeen (17), the east half of section number eight (8), the southeast quarter of section number five (5), and the south half of fractional section number four (4), all in town. number three (3) north, of range twenty-three (23) east.

32 And this defendant further answering says, that by an act of the legislature of the State of Wisconsin, entitled "An act to annex a part of the town of Racine to the town of Mount Pleasant, in the county of Racine," approved March 20, 1856, and being chapter 180 of the Private and Local Acts of the State of Wisconsin for the year 1856, all of the following described territory, being part of the then town of Racine, was annexed to and became part of the town of Mount Pleasant, in said county of Racine, to wit: all of fractional township three (3), range twenty-three east, lying south of the south line of the north half of sections five (5) and six (6), without the limits of the city of Racine.

And this defendant further answering says, that by an act of the legislature of the State of Wisconsin, entitled "An act to change the boundaries of the towns of Racine, Caledonia, and Mt. Pleasant, in the county of Racine," approved February 23, 1857, and being chapter 68 of the Private and Local Acts of the State of Wisconsin for the year 1857, the boundaries of each of the towns of Racine, Caledonia, and Mt. Pleasant were so altered that each of said towns should include within its limits and consist of the following territory in the county of Racine, to wit:

33 "*The town of Caledonia* shall include all that territory in said county east of the west line of range number twenty-two (22) east, which lies between the north line of said county and line running from the southwest corner of section No. nineteen (19), in township No. four (4) north, of range No. twenty-two (22) east, eastwardly on the section line to the east line of said county.

"*The town of Racine* shall include all that territory in said county east of the west line of said range No. twenty-two (22), which lies south of a line running eastwardly from the southwest corner of said section No. nineteen (19), in the section line, to the east line of said county, and north of a line running from the southwest corner of section No. seven (7) in township No. three (3) north, of said range No. twenty-two (22) east, eastwardly in the section line to the east line of said county, excepting therefrom all the territory within said limits now included in the city of Racine.

"*The town of Mount Pleasant* shall include all the territory in said county east of the west line of said range No. twenty-two (22) lying south of a line running from the southwest corner of section No. 27 aforesaid, eastwardly on the section line to the east line of said county and north of the south line of said county, excepting therefrom all of the territory within said limits now included in the city of Racine."

And this defendant for greater certainty hereby refers to the said several acts hereinbefore alleged, and prays that the same
34 may be taken and considered as part of this answer to said bill of complaint.

And this defendant further answering alleges and avers, that the several acts of the legislature of the State of Wisconsin, in said bill of complaint mentioned, and those in this answer hereinbefore alleged, were severally passed and adopted by the said legislature without the knowledge, procurement, privity, or consent of this defendant.

And this defendant further answering said bill of complaint alleges and avers, that the town of Orwell or Racine, as the same was constituted and existed prior to the act of March 30th, 1860, at the regular election held according to law in said town, in the month of April, 1859, duly elected three supervisors of said town, to hold, and who, according to the laws of the State of Wisconsin, then and now existing, held their office for the term of one year, and until their successors in office should be elected and qualified; that the supervisors of said town so elected were George Wustum, William Place, and Michael Gorman; that such supervisors duly qualified according to law, and entered upon the discharge of their duties as such supervisors, and that no successors have ever been elected
35 or qualified, and that of said supervisors, one thereof, to wit, George Wustum, still remains and resides within the county of Racine, and within the territory comprised within the then town of Orwell or Racine; and this defendant is advised and believes, and so charges the fact to be, that the said complainant hath an adequate and complete remedy in the premises at the common law, by action against the said town of Orwell or Racine, and that this honorable court, sitting in equity, hath no jurisdiction or right to entertain the said bill of complaint.

And this defendant further answering alleges, that as informed

and as it verily believes true and charges the fact to be, after the passage of the said act of the legislature of Wisconsin of March 20th, 1856, hereinbefore mentioned, and after the changes in the limits of said corporation, the town of Racine, thereby enacted, had been effected, to wit, on the 1st day of April, A. D. 1856, a town meeting of such corporation, the town of Racine, was held at the house of one Leopold Honch, in said town of Racine, as then organized and existing, and then and there at such town meeting, pursuant to law, the electors of said town of Racine, as then constituted and
36 organized, proceeded to the election of officers of said town, in which election and meeting no electors residing in the territory by said last-mentioned act annexed to the town of Mount Pleasant; that among the officers then and there elected, one Stephen N. Ives was duly elected by a majority of all the votes cast, and was thereupon duly declared elected as railroad commissioner for said town of Racine, and was appointed as such pursuant to the act of the legislature of the State of Wisconsin, passed on the 2nd day of April, A. D. 1853, entitled "An act to authorize certain towns to aid in the construction of the Racine, Janesville and Mississippi railroad," and being chapter 289 of the private and local acts of said legislature of the year 1853.

That the said Stephen N. Ives, as this defendant is informed and believes true, accepted such office and qualified and acted as such, and represented the stock taken for and by said town of Racine in exchange for the bonds in said bill of complaint mentioned, and voted thereon as such commissioner, pursuant to said act, and until the time of his decease, to wit, about the month of October, A. D. 1856; and that the board of supervisors of said town of Racine thereupon appointed one J. A. Horlick as such railroad commissioner, to
37 fill the vacancy occasioned by the death of said Ives; that afterwards, and on the 6th day of December, A. D. 1856, the board of supervisors of said town of Racine, by resolution duly passed on that day, rescinded the appointment of said Horlick, and at the same time passed a certain resolution in the words following, that is to say: "Resolved that the town of Racine is in favor and hereby consents to a consolidation of the stock of the Racine and Mississippi Railroad Company with the stock of the Rockford Central Railroad Company; and it is further resolved that the town clerk furnish to the secretary of the Racine and Mississippi Railroad Company a copy of this resolution forthwith."

And this deponent avers and alleges, that the corporation mentioned in said resolution as the Racine and Mississippi Railroad Company was the same mentioned in said bill of complaint and in this answer as the Racine, Janesville and Mississippi Railroad Company, and that said Rockford Central Railroad Company was a corporation then and theretofore existing under the laws of the State of Illinois, organized for the purpose of constructing and operating a railroad to the Mississippi river at a point within the State of Illinois.

And this defendant further answering alleges and avers, that said town clerk did make and furnish a copy of said resolution,
38 as in such resolution directed, and that afterwards the said railroad companies did consolidate their capital stock and business, pursuant to law.

And this defendant further answering alleges and avers, that on the twenty-sixth day of November, A. D. 1856, the board of supervisors of the county of Racine, pursuant to law, did enact, ordain, and determine to, and thereupon did, fix and establish the boundaries of the towns of Racine, Caledonia, and Mount Pleasant, in the same manner as the same were respectively fixed by the act of the legislature of the State of Wisconsin, approved February 23rd, A. D. 1857, and being chapter sixty-eight of the private and local acts of that year, above referred to, and as the said boundaries are hereinbefore and at length set forth, and that said act of the legislature confirmed and established the limits and boundaries so fixed.

And this defendant further answering, upon information and belief alleges and avers, that a plat and record of the boundaries of said towns as thus established, and a record of the proceedings of the board of supervisors of said county in reference thereto, was duly made and kept by the clerk of such board pursuant to such act, and was duly published in the Racine Advocate (a pa-
39 per then published in the city of Racine, in said county) for three successive weeks, pursuant to said act.

And this defendant further answering alleges and avers, that no act, statute, or law has ever been passed or enacted, which in any way authorizes the assessment, levy, or collection of any tax upon the taxable property of this defendant, the town of Mount Pleasant, or by or on the part of the municipal authorities or officers of this defendant, for the purpose of liquidating or paying the bonds mentioned in complainant's bill of complaint, or the interest-warrants attached, or any part or portion thereof; or wherein or whereby this defendant has been or may be authorized or empowered to answer or pay any indebtedness of said town of Racine or Orwell, or wherein or whereby this defendant has or may become proprietor of or invested with the stock or any portion thereof, in exchange for which said bonds are claimed to have been issued, or wherein or whereby this defendant might or could hold the same in pledge or in trust, or whereby this defendant should become the successor in interest to the said corporation which is alleged to have issued said bonds.

And this defendant further answering avers and alleges, that this defendant has never assumed or undertaken by any act
40 on its part any trust or duty in the premises, and has never taken any step or action recognizing the acts of said town of Racine in the premises, or whereby they find, hold, or claim to hold said stock, and has never by any act on its part assumed, ad-

mitted, or recognized said bonds or interest-warrants in said bill of complaint mentioned, or the validity thereof.

And this defendant further answering alleges and avers, that the first coupon or interest-warrant originally attached to and issued with each of the bonds mentioned in the complainant's bill of complaint, and exhibited thereto, to wit: the coupons which by their terms fell due on the tenth day of February, A. D. 1854, were by said the Racine, Janesville and Mississippi Railroad Company assumed and fully paid, and were cut and detached from said bonds.

And this defendant further answering alleges, that the matters hereinbefore alleged with respect to the acts and things had and done by or on the part of the said corporation, the town of Racine, are matters of record, contained and set forth in the records and proceedings of such town and its board of supervisors, from which the knowledge, information, and belief of this defendant in that behalf is derived. And this defendant prays leave to sub-
41 mit and make such records and proceedings, together with the proceedings and records of this defendant and its supervisors in the premises, for greater certainty, part of this its answer, and to refer to the same as it may be advised.

All which matters and things this defendant is at all times ready to aver, maintain, and prove, as this honorable court may direct.

Without this, that any other matter or thing in complainant's said bill of complaint stated, and not herein and hereby well and sufficiently answered, traversed, avoided, or denied, is true to the knowledge or belief of this defendant.

Wherefore this defendant prays judgment, to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

THE TOWN OF MOUNT PLEASANT,

By

FISH & LEE, *Solicitors.*

L. S. DIXON, *of Counsel.*

EASTERN DISTRICT OF WISCONSIN, *ss.*

On this 24th day of April, A. D. 1875, before me personally came , who, being by me duly sworn, did depose and say, that he is chairman of the board of supervisors of the town of Mount Pleasant, in the county of Racine, the above-named corporation, which makes the foregoing answer. That he
42 has heard the said answer read, and knows the contents thereof, and that the same is true to his knowledge, except as to the matters which are therein stated upon the information and belief of the defendant, and as to those matters he believes it to be true.

Endorsed as follows:

"Stipulated that this answer stand as duly signed and sworn to.

FULLER & HARKNESS,

April 28, 1875. *Compl't's Solrs.*

ritory comprised within the then town of Orwell or Ra-
47 cine; and this defendant is advised and believes, and so alleges the truth to be, that the said complainant hath an adequate remedy in the premises at common law, by action against the said town of Orwell or Racine, and that this honorable court, sitting in equity, hath no jurisdiction of, or right to entertain, the said bill of complaint.

And this defendant, further answering, alleges and avers, that no act, statute, or law has ever been passed or enacted which in any way authorizes the assessments, levy, or collection of any tax upon the taxable property of this defendant, the town of Mount Pleasant, or by or on the part of the municipal authorities or officers of this defendant, for the purpose of liquidating or paying the bonds mentioned in complainant's bill of complaint, or the interest-warrants attached, or any part or portion thereof; or wherein or whereby this defendant has or may become proprietor of or invested with the stock or any portion thereof, in exchange for which said bonds are claimed to have been issued, or wherein or whereby this defendant might or could hold the same in pledge or in trust, or whereby this defendant should become the successor in interest to the said corporation which is alleged to have issued said bonds.

48 And this defendant, further answering, avers and alleges that this defendant has never assumed or undertaken, by any act on its part, any trust or duty in the premises, and has never taken any step or action recognizing the acts of said town of Racine in the premises, or whereby they find, hold, or claim to hold said stock; and has never, by any act on its part, assumed, admitted, or recognized said bonds or interest-warrants in said bill of complaint mentioned, or the validity thereof.

And this defendant, further answering, alleges and avers, that the first coupon or interest-warrant originally attached to and issued with each of the bonds mentioned in the complainant's bill of complai*nant*, and exhibited thereto, to wit, the coupons which by their terms fell due on the tenth day of February, A. D. 1854, were by said the Racine, Janesville & Mississippi Railroad Company assumed and fully paid, and were cut and detached from said bonds.

All which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court may direct.

Without this, that any matter or thing in said bill of complaint stated, and not herein well and sufficiently answered, traversed, or denied, is true to the knowledge or belief of this defendant.

49 Wherefore this defendant prays judgment, that it may be hence dismissed with its costs and disbursements in this behalf most wrongfully sustained.

THE TOWN OF CALEDONIA,
By
Chairman of the Board of Supervisors of said Town.

JENKINS, ELLIOTT & WINKLER, *Solicitors for Defendant.*
JAS. G. JENKINS, *of Counsel.*

Answer of City of Racine.

In the Circuit Court of the United States for the Eastern District of Wisconsin.

The answer of the city of Racine, defendant, to the bill of complaint exhibited by Charles Beckwith, complainant, against the town of Mount Pleasant, the city of Racine, and the town of Caledonia, defendants

This defendant, now and at all times hereafter saving and reserving to itself all and all manner of benefits and advantages of exception to the manifold errors and insufficiencies in the complainant's bill of complaint contained, for answer thereto, or unto so much and such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

That by an act of the legislature of the State of Wisconsin, entitled "An act to annex a part of the town of Racine to the town of Mount Pleasant, in the county of Racine," approved March 20th, 1856, and being chapter 180 of the Private and Local Acts of the State of Wisconsin for the year 1856, all of the following described territory, being part of the then town of Racine, were annexed to and constituted and became part of the town of Mount Pleasant, in said county of Racine, to wit: all of fractional township three, range twenty-three east, lying south of the south line of the north half of sections five and six, without the limits of the city of Racine; that in said act last named no provisions were made by the legislature of the State of Wisconsin apportioning any debt that the said town of Racine might then have been owing.

50

And this defendant further answering says, that by an act of the legislature of the State of Wisconsin, entitled "An act to change the boundaries of the town of Racine," approved February 23, 1857, and being chapter 68 of the Private and Local Acts of the State of Wisconsin for the year 1857, the boundaries of the towns of Racine, Caledonia, and Mount Pleasant were so altered that each of said towns should include within its limits and consist of the following territory in the county of Racine, viz:

"The town of Caledonia should include all that territory in said county east of the west line of range No. twenty-two (22) east, which lies between the north line of said county and line running from the southwest corner of section nineteen (19) in township four (4) north, of range No. twenty-two (22), eastwardly, on the section line, to the east line of said county."

51

"The town of Racine shall include all that territory in said county east of the west line of said range No. twenty-two (22), which lies south of a line running easterly from the southwest corner of said section No. 19, on the section line, to the east line of said county and north of a line running from the southwest corner of section No. 7, in township No. three (3), north of said

range No. twenty-two (22) east, eastwardly on the section line to the east line of said county, excepting therefrom all the territory within the limits now included in the city of Racine."

"The town of Mount Pleasant shall include all the territory in said county east of the west line of said range No. twenty-two (22), lying south of a line running from the southwest corner of section No. seven (7) aforesaid, eastwardly on the section line to the east line of said county, and north of the south line of said county, excepting therefrom all of the territory within said limits now included in the city of Racine."

52 And this defendant, further answering the said bill of complaint, alleges and avers that the town of Orwell, or Racine, as the same was constituted prior to the act of March 30th, 1860, referred to in the complainant's bill, to wit, at the regular election held according to law in the month of April, 1859, duly elected their supervisors of said town, to hold, and who, according to the laws of the State of Wisconsin then and now existing, held their office for the term of one year, and until their successors in office should be elected and qualified.

That the supervisors of said town so elected were Geo. Wustum, Michael Gorman, and William Place; that said supervisors duly qualified according to law and entered upon the discharge of their duties as such supervisors, and that no successors have ever been elected or qualified, and that of said supervisors one thereof, to wit, George Wustum, still survives and resides within the county of Racine, and within the territory comprised within the town of Orwell or Racine.

And this defendant further answering alleges and avers, that by the act of the legislature of March 17, 1871, private and local laws referred to in the complainant's bill, the territorial boundaries of the said city of Racine was enlarged, as in the complainant's bill alleged, but that the said city of Racine was only to assume

53 and pay so much of the municipal indebtedness of the former town of Racine, if any, as the lands described in the first section of said act as may become legally chargeable with and liable to pay: *Provided*, that nothing in said act contained should be construed to recognize or confirm any such municipal indebtedness of said former town of Racine.

And this defendant, for greater certainty, hereby refers to the said several acts hereinbefore alleged, and those referred to as in complainant's bill, and prays that the same may be taken and considered as part of this answer to said bill of complaint.

And this defendant is advised and believes, and so alleges the truth to be, that the said complainant hath an adequate remedy in the premises at common law, by action against the said town of Racine or Orwell, and that this honorable court sitting in equity hath no right or jurisdiction to entertain the said bill of complaint as against this defendant.

All of which matters and things this defendant is ready to aver and maintain and prove as this honorable court may direct, without this, that any mattter or thing in said bill of complaint stated and not herein well and sufficiently traversed or denied, is true to the knowledge or belief of this defendant.

54 Wherefore this defendant prays judgment, that it may be hence dismissed with its costs and disbursements in this behalf wrongfully sustained.

THE CITY OF RACINE.
LUCIUS S. BLAKE,
President of the City Council of said City.

VAN BUSKIRK & RITCHIE,
Solicitors for Defendant.
S. B. VAN BUSKIRK, *of Counsel.*

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF WISCONSIN. }

On the 26th day of April, 1875, before me personally came Lucius S. Blake, who, being by me duly sworn, did depose and say that he is president of the city council of the city of Racine, one of the above-named corporation defendants, and makes this verification on its behalf; that he has heard read the foregoing answer by him subscribed in behalf of this defendant, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters which are therein stated on information and belief of the defendant, and as to those matters he believes it to *be* true, and makes this verification on account of the absence of the mayor of said city.

CHARLES H. LEE,
United States Commissioner, Eastern District Wisconsin.

55 May 3, 1875.—This day came the complainant by his solicitors, and filed his replications, as follows:

Replication to Answer of Town of Mt. Pleasant.

In the Circuit Court of the United States for the Eastern District of Wisconsin.

The replication of Charles Beckwith, complainant, to the answer of the defendant, the town of Mount Pleasant.

This repliant, now and at all times hereafter saving and reserving to himself all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the answer of the said defendant, the town of Mount Pleasant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained and not herein and

hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain, and prove,
56 as this honorable court shall direct, and humbly prays as in and by his said bill of complaint he has already prayed.

FULLER & HARKNESS,
Solicitors for Complainant.

Replication to Answer of Town of Caledonia.

In the Circuit Court of the United States for the Eastern District of Wisconsin.

The replication of Charles Beckwith, complainant, to the answer of the defendant, the town of Caledonia.

This repliant, now and at all times hereafter saving and reserving to himself all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, the town of Caledonia, for replication thereunto says that he will aver and maintain and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain, and prove, as
57 this honorable court shall direct, and humbly prays as in and by his said bill of complaint he has already prayed.

FULLER & HARKNESS,
Solicitors for Complainant.

Replication to Answer of City of Racine.

In the Circuit Court of the United States for the Eastern District of Wisconsin.

The replication of Charles Beckwith, complainant, to the answer of the defendant, the city of Racine.

This repliant, now and at all times hereafter saving and reserving to himself all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be
58 ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill of complaint he has already prayed.

FULLER & HARKNESS,
Solicitors for Complainant.

May 12, 1875.—This day came Charles H. Lee, Esq., master in chancery of this court, and filed his report, as follows:

Master's Report.

Circuit Court of the United States for the Eastern District of Wisconsin.

LATHAM CORNELL, COMPLAINANT,
vs.
THE TOWN OF MOUNT PLEASANT, the Town of Caledonia, and the City of Racine, Defendants.

CHARLES BECKWITH, COMPLAINANT,
vs.
THE TOWN OF MOUNT PLEASANT, the Town of Caledonia, and the City of Racine, Defendants.

It is stipulated that the testimony in the above-entitled causes shall be taken before Charles H. Lee, Esq., of Racine, a
59 master and examiner in chancery, and certified by him and reported to the court, and that the testimony so taken shall be read and used on the hearing of these causes, subject, however, to any legal objection made or taken to the competency of such testimony.

Dated April 30th, 1875.

FULLER & HARKNESS,
Solicitors for Complainant.
FISH & LEE,
Solicitors for Mt. Pleasant.
S. B. VAN BUSKIRK,
Solicitor for Racine City.
JENKINS, ELLIOTT & WINKLER,
Solicitors for Caledonia.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Seventh Circuit and Eastern District of Wisconsin. In equity.

LATHAM CORNELL, COMPLAINANT,
against
THE TOWN OF MOUNT PLEASANT, the Town of Caledonia, and the City of Racine, Defendants.

CHARLES BECKWITH, COMPLAINANT,
against
SAME DEFENDANTS.

To the judges of the Circuit Court of the United States for the Eastern District of Wisconsin.

In pursuance of a stipulation of the several parties by their solicitors in the above-mentioned suits, whereby the same are referred to me, as one of the masters and examiners of this court, to take and report the testimony and proofs therein, and having been attended at several times by counsel for the complainants and for the respective defendants, and having taken the proofs offered and adduced upon the several matters, as to which the said parties were advised to offer proof, I do hereby respectfully report:

That the respective parties have agreed upon the facts stated in the exhibit hereto annexed, consisting of six pages and marked Schedule "A," and each and all the several statements therein contained are admitted to be true as set forth; and it is further admitted that the several plats or drawings contained in such schedule are comparatively accurate and in all material respects correctly show the several changes and alterations in the territory and boundaries of the defendant towns.

That I have computed and ascertained as accurately as possible the values of the real and personal property subject to taxa-
61 tion, comprised within the several tracts of territory hereinafter mentioned, the real estate being stated separately and the personal property by itself, at the several times and periods as stated in the accompanying schedules "B," "C," "D," "E," "F," and "G," hereto annexed. That I have also taken the testimony on behalf of complainants, which is comprised in schedule "H," and have ascertained the amount due upon the bonds and interest-warrants upon which said suits are founded and which are particularly mentioned in schedule "I," containing also a computation of the amount due thereon. I have also taken the testimony offered in behalf of defendants which is set forth and reported in the schedule "K," hereto annexed and herewith returned.

And I further report that in ascertaining the values of real estate mentioned in the accompanying schedules I have had recourse to the assessment and tax rolls for the year set at the head of each of such schedules respectively, and have selected the necessary items from such rolls by means of the description thereof, reference for aid being had to such maps and plats as were necessary and available for that purpose.

62 That I have ascertained the values of personal property reported in said schedules in like manner, together with the testimony of witnesses, as set forth in schedule "H," hereto attached.

That I have, in making up said schedules, wholly disregarded the act of 1856, which annexed certain territory to the city of Ra-

cine (to wit, chapter 83, Local Laws Wisconsin, 1856), conceiving that inasmuch as the same has been held inoperative and void by the Supreme Court of the State of Wisconsin, the same should not be deemed to have ever been of force. So much, therefore, of the territory as said act purported to annex has been thrown back upon and included within the municipal divisions to which the same would at the time have belonged had said act not been passed.

And I further certify that each of the witnesses whose testimony appears in the subjoined schedules was, before testifying, duly and solemnly cautioned and sworn, and their testimony by me correctly written down and read over to them in their presence, and by them respectively subscribed in my presence.

And I further certify that the bonds and interest-warrants mentioned in schedule "I" have been by me signed as master, &c., on the back thereof, and the title of the suit in which the same was
63 offered is endorsed on the back of each bond, and the said bonds and interest-warrants, together with this report, are now brought and delivered into court with my own hand, to abide the order thereof.

And I further certify that in the rolls for the year 1853, referred to in schedule "B," hereto annexed, the personal property and real estate are assessed and set down in the same place, and the items of personal property were, therefore, selected without the aid of testimony from the assessment and tax rolls for that year, selecting the same according to description.

Respectfully submitted and reported.

CHARLES H. LEE,
Master and Exr. in Chancery.

Dated Racine, May 12*th*, 1875.

64 *Statement of Fees, Costs, &c.*

For complainants:

Master's fees		$125.00
Witness fees—		
J. Hagerer	$1.56	
H. T. Taylor	1.56	
A. G. Knight	1.56	
A. Filer	1.56	
S. Steele	5.76	
	$12.00	
E. C. Peck	4.50	
		$16.50
Marshal's fee		6.50
		$148.00

This amt. paid by complainants.
C. H. LEE.

For defts.:

Witness fees—		
E. Peck	$1.56	
C. Herrick	1.56	
W. C. Allen	1.56	
T. Dickinson	1.56	
	$6.24	
Master's fees	10.00	
		$16.24

This amt. paid by defts., Mt. Pleasant and Caledonia.
C. H. LEE.

65 *Schedule "A."*

In the Circuit Court of the United States for the Eastern District of Wisconsin.

LATHAM CORNELL, COMPLAINANT,
vs.
THE TOWN OF MOUNT PLEASANT, THE Town of Caledonia, and the City of Racine, Defendants.

CHARLES BECKWITH, COMPLAINANT,
vs.
THE TOWN OF MT. PLEASANT, THE TOWN OF CALedonia, and the City of Racine, Defendants.

Statement of facts agreed to in the foregoing causes, subject to all objections for immateriality by either party.

First. The legislature of the Territory of Wisconsin, by an act approved Jan. 2d, 1838, among other things established the towns of Racine and Mount Pleasant, and defined their respective boundaries. Plat No. 1 shows the town of Racine and the east part of the town of Mount Pleasant.

Second. The legislature of said territory, by an act approved Feb. 7th, 1842, among other things creates the town of Caledonia, being town. 4, range 22 E., and the same act (sec. 3) extends the town of Mount Pleasant east to the range line between ranges 22 and 23 east, as shown by Plat 2.

[Here follows diagram, marked page 66.]

66 *Third.* The legislature of the State of Wisconsin, by an act approved August 8th, 1848, incorporated the defendant, the city of Racine, and defined its territorial limits to be comprised within fractional sections nine (9) and sixteen of fractional township three, range 23 east. Plat 3 shows the boundaries of the three defendants, and also of the town of Racine at the time the bonds were issued, Dec. 6, 1853.

Fourth. It is admitted that the town of Racine, on or about the 6th day of Decr., 1853, upon the consideration, in the manner, and under the circumstances alleged in the respective bills of complaint of the complainants, made and delivered its bonds, but the amount due to the complainants, respectively, is to be ascertained by a production of the bonds and coupons and a computation in court or before a master.

67 [Here follows diagram, marked page 67.]

Fifth. The legislature of the State of Wisconsin, in and by an act published as ch. 83 of the Local Laws of 1856, declared that certain territory (describing it) should be and thereby was added to the city of Racine. The description, in brief, was of just one half-

It was further agreed "that the said J. W. Parish & Co. would allow three working days for discharging each cargo at either one of the points before mentioned; after that time demurrage to be allowed by the said Henry Johnson, medical storekeeper, United States army, as per charter party or bill of lading of the vessel."

The medical officer in charge of the post where it was delivered was authorized to pass upon the *quality* of the ice, but not the weight; and as to the quantity, he was required to pay in accordance with the bills of lading, unless he rejected a portion of the cargo for defects in quality.

The contract fixed the number of tons of each cargo at the point of lading, and the Government paid according to the amount specified in the bills of lading. The Government reserved three days for unloading, and if for any reason the vessel was not unloaded in that time, paid the same demurrage which Parish & Co. had agreed to pay the owners of the vessel.

All waste from the action of the elements *en route* was at the risk of the Government. All loss at the terminus was to be borne by the Government. Depots for storing the ice were to be provided by the Government, as it had agreed to take the ice from the vessel and to remove it within three working days after arrival.

This arrangement was made with full knowledge that the ice would waste to a greater extent *in transitu* during the hot summer months than if transported in the spring, and the Assistant Surgeon-General in March directed the delivery of 10,000 tons at Memphis and 10,000 tons at Nashville, saying: "The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay."

The court below found as facts the following:

1. That the contract stated in the petition was entered into.

2. That R. C. Wood was assistant surgeon-general at St. Louis before and after March 25, 1863.

That Joseph B. Brown was at the same time a surgeon in the United States army on duty at St. Louis in the Surgeon-General's office.

3. That the instructions to Assistant Surgeon-General Wood from Surgeon-General Hammond, dated July 28, 1862, were given.

4. That the order of Surgeon Joseph B. Brown directing the delivery of 30,000 tons of ice was made "by instruction of Assistant Surgeon-General Wood," and that it was forwarded to the Surgeon-General's office.

That a telegram from Surgeon-General Hammond directed Wood to suspend the order given to Parish & Co.

That a letter from C. H. Alden, assistant surgeon, U. S. A., was sent from the Surgeon-General's office to Assistant Surgeon-General Wood.

5. That a telegram, dated March 31, 1863, was sent by Assistant Surgeon-General Wood to Parish & Co. suspending his order until further instructions were given from the Surgeon-General. That it did not reach claimants. That April 2, 1863, the claimant Parish was orally informed by the Assistant Surgeon-General of this suspension notice.

6. That from March 25 to April 2, Parish had purchased or contracted for 23,000 tons of ice in addition to 8,100 already on hand.

7. That 12,768 tons were delivered, and the contract price paid therefor.

8. That 10,000 tons of ice were purchased at Lake Pepin, Minn., which might have been transported in April, but after that time could not be, and was melted and lost.

9. That "the said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the

terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

10. That the order of March 25, 1863, suspended by the Surgeon-General, remained suspended until the expiration of the contract.

We suggest that these findings of fact do not sustain the opinion of the court below.

We admit that the contract did not call for 30,000 tons of ice, nor for any other specific amount, but it did call upon the claimants to furnish all the ice that might be required. The order of March 25, 1863, was made under the contract and *required* 30,000 tons, and required 20,000 tons to be delivered without delay.

The contract was perfect and specific in all respects with one exception. It did not specify the exact amount. That was left to be determined by the officer having the right in that department of the army to order it. When the order of March 25, 1863, was made, the contract became in all respects complete.

Points.

I.

The act of Congress vesting the Court of Claims with jurisdiction of this claim recognized the validity of the contract as construed by Parish & Co., and submitted only questions of fact as to damages and violation of the contract.

This court has recognized the right of Congress to validate prior acts and to limit the jurisdiction of the court to specific points in *Roberts et al.* vs. *United States*, 2 Otto, 47.

Congress had full power to decide every question con-

nected with this claim, to validate an imperfect contract, to construe the contract to be as claimed by the claimant, to determine the fact of violation and the measure of damages—in fact, to give full relief.

It decided the contract to be valid. It construed "the whole amount of ice required to be consumed at Nashville, St. Louis, Cairo, and Memphis, during the remainder of that year," to be "the entire thirty thousand tons named in said contract." This construction is conclusive on the Court of Claims. It can no more set it aside than it can pass upon the power of the medical purveyor to make the contract, or than it could set up the bar of the statute of limitations. This is the rule in *De Groot* vs. *United States*, 5 Wall., 432–3.

As a matter of fact there is nothing in the contract proper about 30,000 tons of ice. This amount is first mentioned in the order of March 25, 1863. It required the order to complete the contract, and such must have been the view taken by Congress. Otherwise there could have been no reference to 30,000 tons, and nothing about "the refusal of the Government to receive the entire 30,000 tons *named in said contract.*"

It seems clear to us that Congress by the act of May 31, 1872, held that the order for the 30,000 tons of ice completed the contract and was a part of it.

II.

The Court below erred in defining the rank, authority, and discretion of the Assistant Surgeon-General.

The opinion states:

"The fact is, Wood attempted to do what he had not the least authority to do; that is, to make definite and fixed what his superior officers had purposely left

indefinite, because in the nature of the case they could not fix it, and to interpret by his judgment what was by the terms of the contract clearly intended to be interpreted by the judgment of his superiors, based on the accruing demands of the service."

The officers named in the contract are held by the court below to be the superiors of the Assistant Surgeon-General. The first officer named is "Henry Johnson, medical storekeeper," United States army. The other officers named are the medical officers in charge at Nashville, St. Louis, Cairo, and Memphis.

By statutes in force in 1863, medical purveyors and storekeepers were required to give bond, to be approved by the Secretary of War, as naval storekeepers were required to give a similar bond, approved by the Secretary of the Navy.

They were appointed from civil life by the Secretary of War in the one case, and the Secretary of the Navy in the other.

The surgeons in charge of posts ranked as majors, and they had authority to make requisitions upon the storekeepers for supplies which were in their charge. In regard to supplies to be delivered at the several posts, the power of the officers in charge to inspect and receipt for them was limited by the written contracts, if delivered under contracts based on proposals and bids. In cases of necessity, they were authorized to purchase in open market.

The discretion of determining how much ice should be shipped to each point named in the contract with Parish & Co. was not given by the contract to the purveyor or the post surgeons, but the contract was silent upon that point.

The inference of the Court of Claims that the amount of ice was to be fixed by the superiors of the Assistant Surgeon-General is not warranted by the facts. The contract was made with Henry Johnson, a medical store-

keeper, with no rank higher than that of lieutenant. The Assistant Surgeon-General of that department was his superior officer, and as such had the right and power to make the order for ice. Had Henry Johnson been the highest officer in that department his order would have been good.

There must, of necessity, be a superior officer in every army, and in every department. There must be a head—some officer that all others must obey. If such officer acts within the scope of his duty, he may err in judgment, but his orders are supreme until reversed or suspended by higher authority. And until such order is reversed, or suspended, it is the duty of all inferior officers within that army or department to obey. It is not for them to anticipate reversals or suspensions. Without implicit and instant obedience an army becomes a mob. It will not do to allow officers, privates, and contractors to sit in judgment on the acts and orders of their superiors. The central idea of an army is that inferiors must be judged by superiors, and inferiors must obey, no matter what their judgment may be. Any other rule brings anarchy and utter confusion.

In this case, suppose that the claimants had paid no attention whatever to the order of March 25. Suppose that they had concluded that the Assistant Surgeon-General had no right to fix the quantity. Suppose that the order had not been suspended; and suppose that in consequence of such failure, on the part of the claimants, the Government had been compelled to pay a much greater price for ice than that mentioned in the contract with the claimants. And suppose, further, that suit had been instituted by the Government against Parish & Co. for a failure to comply with their contract. Would it, under these circumstances, be a good defence for Parish &

Co. to plead that the Assistant Surgeon-General had no authority to make such an order, and that, when he made it, he was acting beyond his power, and that Parish & Co. were under no obligation to give the slightest attention to it? Would not the court instantly have decided that the order was good until suspended by some superior officer?

We need claim no more than this: The order was good at least until suspended. If this is so, then the claimants had a right to act upon it as soon as it was received. How long had they the right to act? We answer: Until notified of the suspension. They received this order on the 25th of March. They bought the ice necessary to fill the order during that month, and did not receive notice of suspension until April 2.

We suppose the Surgeon-General thought the order too large. If it had been, say for 10,000 tons, it would not have been suspended. If it had not been suspended it would have been good. It follows then, as the night the day, that it was good until suspended.

The power, the right, the authority of the Assistant Surgeon-General did not then depend upon the amount he ordered. The amount was in his discretion. If he erred he was liable to be corrected by his superior, and all parties acting in good faith upon the order before its suspension must be protected.

It seems to us that any other rule would put an end to war.

It cannot be said that Assistant Surgeon-General Wood endeavored to override the judgment of his superiors. His superiors had not fixed upon any specific amount. He was exercising his discretion and judgment first. His superior suspended the order. If after that he had ordered the same amount, then it could be said that he tried to override the judgment of his superiors.

The Secretary of War had assigned the Assistant Surgeon-General to duty at St. Louis, under an order referred to in the instructions of Surgeon-General Hammond. Thirteen States were assigned to his charge, with power to assign subordinates, surgeons, and inspectors to duty; to define the boundaries of their districts; to require duplicate reports from medical inspectors; to judge of the necessity of increasing the number of general hospitals; to make contracts with private physicians; to approve in the first instance contracts in his district; to employ civilian nurses; to approve requisitions of medical purveyors on the purchasing purveyors, and in case of necessity he was allowed to order immediate purchase of such medicines and other supplies as might be required, informing the Surgeon-General as soon as possible of his action.

Here was a general authority to use his discretion in regard to medical and other supplies in his department, which certainly covered the ordering of ice already contracted for, and included the right to designate the amount needed for the armies in the field.

The Assistant Surgeon-General was not required to obtain the approval of the Surgeon-General before he could act, but was authorized to act, and report after he had acted.

The power exercised is that given medical directors, and which was exercised in *Crowell* vs. *United States*, 2 Court Claims, 506, and sustained by that court againt the protest of the Surgeon-General.

The court in that case held that the general commanding the department and his medical director were the best judges of the necessities of the army in regard to a supply of ice, and that the price demanded, $30 per ton, was not excessive, thus overruling the two objections made by the Surgeon-General; the court holding that "as between in-

dividuals, there could not be a doubt of the right of the claimant to recover under similar circumstances."

In our case the contract price is admitted to be correct, and the only point made is that of the power of the Assistant Surgeon-General to designate the quantity to be delivered and the time of delivery. The *Crowell* case sustains our view. He had been designated as the executive medical officer of several departments of the army. He stood in the place of the Surgeon-General as to those departments, and was required to make personal inspection of the wants of the armies, which gave him a better knowledge of the supplies needed than could be obtained by the Surgeon-General, in Washington.

A case exactly in point has been decided by this court, where it was held that pressing a claim upon the Second Assistant Postmaster-General was the same as pressing it upon the head of the Department. "We suppose that the Assistant Postmaster-General was appointed for precisely such functions as this one discharged in the matter, and it would be a dangerous principle to hold that the Department is bound alone by what is transacted by the Postmaster-General in person; for the same rule would free parties dealing with the Department from obligations not assumed directly with its head."

Alvord vs. *United States*, 5 Otto, 358.

The Assistant Surgeon-General exercised the discretion to order an immediate supply for Memphis and Nashville, and determined the amount to be sent to St. Louis and Cairo. The authority of the Assistant Surgeon-General was ample at the time this order was given. If the telegram of the Surgeon-General of March 31, 1863, operated as a recall of such authority, it did not affect the rights of Parish & Co., because they had already acted.

"Persons who deal with an agent before notice of the recall of his powers are not affected by the recall."

Hatch vs. *Coddington*, 5 Otto, 56.

See *Thompson* vs. *United States*, 9 Ct. Claims, 196, 197.

Wilder vs. *United States*, 5 Ct. Claims, 475.

The rule as to discretion is well stated by Attorney-General Wirt in 1 *Opinions Attorney-General*, 397: "The contractor is not supposed to know what troops are already at the post, or are intended to be there. The requisition of the commandant is his only guide as to the number of rations; and this he is bound to obey, provided the requisition be such an one as is authorized by the contract.

"Suppose, then, the commandant, under the name of a six months' supply, (which he is authorized to make,) should call for twice as many rations as could be consumed in that time; or suppose that, although not too many at the time of the call, they became too many by half, by the Government's withdrawing one-half of the troops for whose use they were designed—and, in either event, the supplies, from being on hand longer than was expected, should spoil; is there any principle, either of equity or law, which could throw this loss on the contractor? I think not. The requisition is an assurance on the part of the Government that the rations were necessary, and an engagement in law, that, if furnished, they will be consumed or paid for."

Under this rule, it seems to us the order of the Assistant Surgeon-General was authorized, and Parish & Co. were required by law to obey it. The order was never revoked, only suspended; and before this suspension Parish & Co. had the right not only, but it was their duty to act The record shows no action by the Surgeon-General except his telegram. The letter of Assistant Surgeon Alden,

which attempts to construe the contract, does not upon its face purport to be made in the name of the Surgeon-General. The Assistant Surgeon-General acted upon the telegram, and he sent the telegram to Parish & Co. "to suspend the order I have given you till further instructions are given from him, [the Surgeon-General.]" The purport of this telegram was communicated orally on the 2d of April to Parish & Co. for the first time.

The suspension was not a notification that the 30,000 tons of ice was not the amount required for the year at the posts named in the contract.

The contractor having before the suspension of the order gone to all the expense but that of transportation, he held the ice as trustee for the Government, subject to its orders, and the suspension of the order was a violation of the contract, from which time the liability accrued. This is sustained by the rule in *Brandeis* vs. *United States*, 3 Ct. Claims, 103.

The suspension of the order did not abrogate the contract, nor lessen the liability of the Government.

Wilder vs. *United States*, 5 Ct. Claims, 474.

The steps taken by Parish & Co. to secure the full amount required by their contract for the posts therein named, entitled them even under the order of suspension to hold the ice so secured as trustees for the Government. It was necessary to act promptly to secure ice; and this necessity required a designation of the amount required. Their contract did not call for the establishment of ice depots, and the storage of an indefinite quantity, to be delivered "as required" by the post surgeon, but that they should procure and deliver the "amount required." They came within the rule in—

Hughes vs. *United States*, 4 Ct. Claims, 73, 74.

Lee vs. *United States*, 4 Ct. Claims, 163, 164.
United States vs. *Smith*, 4 Otto, 217.
Tenney vs. *United States*, 10 Ct. Claims, 273.

Unless the Assistant Surgeon-General had the power to make such an order, to determine how much ice was needed and when and where, it is hard to see of what use such an officer was. If in dealing with this officer the Government can avoid responsibility by denying his authority, then all persons contracting or dealing with him would be released from all obligations.

All that had been done by the claimants under the order must stand. What the claimants had already done could not be suspended or annulled.

III.

THE MEASURE OF DAMAGES.

The contract provided for payment for the quantity of ice shipped from the place of loading and shown by the bill of lading. The medical inspector had no control over the quantity. If the ice was of the proper quality he must receive and receipt for it according to the bill of lading.

The suspension of the order for the delivery of ice at Memphis and Nashville prevented the delivery of 12,794 tons at those places. The contractor had on the 2d of April no further expenses to incur to deliver that amount of ice but the cost of transportation. He was therefore entitled to the contract price less transportation for 12,794 tons of ice.

The contract had fixed the value of the ice, including transportation; and the loss to the contractor on all ice, lost by neglect of the Government to receive it prior to the

expiration of the contract, was that agreed value, less transportation.

This measure of damages is sustained by—

Masterson vs. *Mayor*, 7 Hill, 62.

Philadelphia & Baltimore R.R. Co. vs. *Howard*, 13 How., 344.

Speed vs. *United States*, 8 Wall., 84.

Hardy vs. *United States*, 9 Ct. Claims, 243–4.

United States vs. *Smith*, 4 Otto, 218, 219.

Solomon vs. *United States*, 19 Wall., 20.

The case last cited is conclusive on the question that the contract price is the measure of the value of the ice to the contractor, when the Government suffers that for which it has contracted to go to waste.

The case of *Mason* vs. *The United States*, (17 Wall., 67,) cited by the Solicitor-General, is not parallel. Suppose Mason, under his contract, had manufactured one hundred thousand guns before the commissioners had changed the number to thirty thousand, would not the Government have been bound to pay for all manufactured under the contract?

In the case at bar the claimant *under the contract* being ordered by the Assistant Surgeon-General to deliver at once thirty thousand tons of ice, he immediately, as it was his duty to do, purchased twenty-three thousand tons. If the order had been suspended before the purchase, then the case might have been parallel with that of *Mason* vs. *The United States;* but the order was not suspended until the ice had been purchased.

It is not easy to see why the claimant should have refused to deliver ice because the order had been suspended. The order had been given, and upon the strength of that order he had made the purchase, and then the order was

suspended. There was nothing in all this that could have justified the claimant in refusing to furnish ice. All the claimant could do was to furnish all the ice required thereafter, and stand upon his rights so far as the order of the Assistant Surgeon-General was concerned. Neither was it necessary for him to "maintain a state of forensic hostility," by publicly insisting upon all occasions that he had been robbed. It certainly was not necessary for him, when told by the Assistant Surgeon-General that all the ice ordered would be needed, to contradict the statement.

The claimant had only to furnish the ice under his contract, or keep himself in readiness so to do. The moment the order was made the claimant was justified in making arrangements to comply with it. He had not enough on hand to fill the order. It was not for him to wait for a suspension. If he was going to purchase, he must do so at once. The moment it should become known that the Government had ordered 30,000 tons, the price of ice would advance. He did not buy the ice fearing that the order would be suspended, but he bought it immediately, because he was ordered to furnish it immediately.

IV.

RECAPITULATION.

In this case we claim—

First. That the contract has been validated by the act of Congress.

Second. That the order issued by the Assistant Surgeon-General has been, by the act of Congress, made a part of the contract.

Third. That the only questions submitted under the act are (1) the violation of the contract by refusing or failing

to receive the thirty thousand tons of ice, as ordered, and (2) the amount of the damages.

Fourth. That the Assistant Surgeon-General had the right, power, and authority to issue the order.

Fifth. That the order was valid until suspended.

Sixth. That it was the duty of Parish & Co. to obey the order until they were notified that the order had been suspended.

Seventh. That all acts done in obedience to the order before it was suspended are precisely the same, and bind the Government just the same, as though the order had never been suspended.

Eighth. That in this case the measure of damages is the contract price, deducting the cost of transportation.

Ninth. We do not claim that the Assistant Surgeon-General was supreme. We admit that the Surgeon-General could suspend or annul his orders. What we do claim is, that the orders of the Assistant Surgeon-General were good until suspended, and that all acts done by the claimants before suspension bound the Government precisely as though the order had not been suspended.

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